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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JENNIFER GIORDANO et al., Plaintiffs and Appellants, v. CC'S PIERCE STREET MANOR, LLC, Defendant and Respondent.	A134654 (City & County of San Francisco Super. Ct. No. CGC-10-495999)

Jennifer Giordano (Jennifer) and Riccardo (Rick) Giordano[1] (together, the Giordanos), appeal from a judgment entered after a jury found in favor of CC's Pierce Street Manor, LLC (CC) on the Giordanos's premises liability and loss of consortium action against CC. The Giordanos contend the trial court: (1) abused its discretion in denying their motion for new trial because under the evidence presented in this case, the jury's finding that CC was negligent compelled a finding of causation; (2) abused its discretion in denying the motion for new trial because the jury's verdict was inconsistent as a matter of law; (3) abused its discretion in denying the motion for new trial because the jury engaged in misconduct; (4) erred in instructing the jury regarding apportionment of fault to unnamed individuals; and (5) abused its discretion in allowing the defense investigator to testify regarding unsworn interviews as substantive evidence, not just for

[1]For ease of reference and with no disrespect intended, we refer to appellants, who share the same last name, by their first names.

impeachment purposes. We agree with the first contention and therefore reverse the trial court's order denying the Giordanos's motion for new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Jennifer and her husband Rick were working as bartenders at a restaurant that hosted a play known as "Tony and Tina's Wedding." One of the play's cast members, Jennifer Justice (Justice), "hit it big in New York" by getting Broadway or off-Broadway work, and the other cast members and the Giordanos decided to have a going away party for her. Jennifer suggested that they go to CC, a bar owned by Cecilia Hendrickson (Hendrickson), who was Jennifer and Rick's long-time friend. Jennifer had been to CC as a customer many times and had also worked there as a bartender for a little under a year, between 2006 and 2007. She thought the party would be a good way for Hendrickson to get more business because it would bring 30 or 40 additional customers to CC while the bar was open to the rest of the public. Jennifer asked Hendrickson if the party could take place at CC on Friday, May 22, 2009, before the long Memorial Day weekend, and explained to Hendrickson that she would bring food and that the party attendees would buy drinks and increase her business. Hendrickson agreed.

A few weeks before the night of the party, Hendrickson told CC employee, Brian Evjenth, that there was going to be a party at CC on May 22, 2009. She told him there was going to be food and asked him to set up a table for the food. According to Evjenth, who had been employed by CC since July 2006, the bar "had a collapsible table," which "we would use when people had food. It wasn't uncommon to have parties in there. We had a way of dealing with food." Evjenth was the bartender and was usually the sole employee at CC from the time his shift started at 4:00 p.m. until Hendrickson took over later in the night.

On May 22, 2009, Evjenth arrived at CC at approximately 4:00 p.m. and did his usual preparation work, which included turning on the lights and collecting ice. He also set up the food table and put a table cloth on it, "which was our custom." According to Hendrickson, Evjenth was the only employee who was operating the premises of CC on May 22, 2009. When asked who managed CC, Evjenth testified that Hendrickson did, or

that when he was the only person there, "[t]hen I would be or whoever else is bartending." On the night of the party, he was the only person in charge until Hendrickson arrived.

Jennifer prepared enough food for the party attendees, as well as for other customers who would be at CC that night. On May 22, 2009, she and Rick took a taxi cab to CC and arrived there at approximately 6:30 p.m. With the help of Evjenth, the Giordanos brought the food inside, and the three of them placed the food on the table that Evjenth had set up.

One of the cast members, possibly Justice's boyfriend, had brought a laptop computer, a small projector, and a white sheet for use as a projection screen so that they could have a slide show and "roast" for Justice. When the Giordanos arrived, the projector and laptop were already set up and Justice and her boyfriend were looking at some images on the wall, possibly to figure out which images to show at the party. Jennifer had no prior knowledge that there was going to be a slide show, and did not pay much attention to what was going on with the projector because she was busy setting the food on the table. Jennifer then left CC to go to a grocery store, and returned shortly thereafter with a cake, which she stored in a back room.

Cast members arrived at various times throughout the evening, and a slide show and roast took place from about 8:00 p.m. to 8:45 p.m., alternating between the slide show and party attendees speaking over a microphone. During this time, Jennifer was either at the food table or in the back of the bar, at the bar counter, or outside. Several party attendees including Jennifer gave toasts to Justice, congratulating her on her new job.

At approximately 9:30 p.m., by which time the projector had been off for some time, Jennifer noticed that cast member Tommy Harkness had arrived, and that he was standing by a table near the front of the bar. She decided to bring him some food; she took a meatball on a fork and walked toward him by walking in front of the projector. She took that path for the first time that night. As she looked straight ahead in the direction she was walking, she tripped on an extension cord and fell hard. Rick and cast

member Joshua Hillinger tried to help her up, but she was unable to place any weight on her right leg. An extension cord was draped around her right leg, and Rick and Hillinger removed the cord from her leg before carrying her to a barstool. Rick and Hillinger put her foot up, and Rick got some ice for her. The leg was twisted and immediately swelled to at least twice its size and turned blue and green.

Jennifer testified she did not see the extension cord before she tripped. She testified that the bar was dimly lit, and that she had told Hendrickson when she worked at CC that she thought the bar was more dimly lit than at other bars at which she had worked. On the night of the incident, the bar was dimly lit, but Jennifer did not recall thinking it was too dark.

There was testimony that the extension cord was either orange or black and that there was either one—or more than one—cord on the floor that night. Cast member Theresa Ireland testified that she saw Jennifer walk across the floor and trip over an extension cord. According to Ireland, the cord, which "obviously, had been coiled up at one point," did not lay flat on the floor. The cord was connected to the projector and went across the floor, over a multi-colored carpet, and was plugged into the wall. It was not taped down. Ireland thought "it was, obviously a tripping hazard," and that "[a]nyone would have tripped over it."

Jennifer waited until Hendrickson arrived at the bar at approximately 11:00 p.m. or 11:30 p.m. so she could tell her in person what had occurred. As soon as Hendrickson saw Jennifer, she said, "My God, girl. What happened to you?" Jennifer told her she had tripped on an extension cord and had been waiting for Hendrickson to get there. Jennifer was crying, and Hendrickson went and got a shot of alcohol for her, saying it would help. Jennifer took the shot, which was the second drink she had that night. Hendrickson called a cab, and with the help of Rick and other cast members, Jennifer got in the cab, and she and Rick went home. Their apartment was a three-story walk up. Rick carried Jennifer up one flight, and Jennifer scooted herself up each of the steps of the remaining two flights, so as not to place any weight on her injured leg.

Rick wanted to take Jennifer to the hospital but Jennifer was not eager to go because her grandfather, who was a physician, warned her that patients may not receive the best care in emergency rooms over holiday weekends, as hospitals are understaffed and doctors are overworked. He had told her to "[a]lways try to wait and see your primary care physician," which is what she decided to do. She and Rick also did not know at the time how badly she was hurt; Jennifer thought she had suffered only a bad ankle sprain. Rick gave Jennifer ibuprofen and iced her leg for 40–45 minutes at a time, with breaks of 20–30 minutes in between. He stayed up all night to watch her, as her pain level increased to a point where she felt it was the worst, most severe pain she had ever felt in her life. She lay in bed through the weekend, using a salad bowl as a bedpan because she could not get out of bed. By Monday, Jennifer knew she had suffered more than just a bad sprain, and left a message for her primary care physician, Christopher Wong, M.D., explaining that she had been seriously injured and needed to be seen urgently.

Dr. Wong saw Jennifer the next morning, and an X-ray disclosed three very serious fractures in her right tibia, fibula, and ankle. Orthopedic surgeon John Belzer, M.D., determined that surgery was necessary to repair the broken bones, and that without a surgical fixation, she would never be able to bear weight on her leg again. Dr. Belzer testified that the diagnosis was "trimalleolar ankle fracture," which was "one of the more serious injuries." He compared the effect of the break to breaking a vase. A less serious injury might be comparable to a vase breaking into two pieces. Jennifer's injury was like a vase breaking into multiple pieces, so that the pieces could not be simply pushed back together. As with a broken vase that will never hold water as well again, the bones would never perform as well as they did before they were broken. He testified that neither the fact that Rick and Hillinger moved Jennifer to the barstool after her fall, nor the fact that Rick carried her up one flight of stairs, nor the fact that she scooted up two flights of stairs, nor her delay in seeking treatment, had any impact on the outcome of her injury.

Jennifer underwent surgery on or about May 28, 2009, and remained in the hospital for one week. Thereafter, she was confined to her house for ten weeks, during

which she suffered severe pain and lost muscle tissue due to her inability to engage in any activity. At the time of trial—towards the end of 2011—she was still unable to bathe without assistance, clean, or walk one street block without pain; she was dependent on Rick for her day to day needs. She lost confidence and suffered great bouts of depression. Dr. Belzer testified the surgery was "excellent and optimal" and "went as well as I hoped it could have," but that Jennifer had likely reached her maximum level of recovery and there was potential for deterioration as she aged. Dr. Wong also believed Jennifer had more likely than not reached her plateau state, i.e., she was not going to recover any more than she had. The parties stipulated that the $48,688.90 in medical expenses that Jennifer had incurred were reasonable and necessary.

The evidence was in dispute as to where the extension cord came from, and who set it up. Hillinger testified that when he arrived at CC that evening, the bar was "pretty empty."[2] He saw a projector sitting on a chair and helped Justice set it up by putting up a sheet that was to be used as a screen. Justice asked "Jennifer Giordano or Rick, one of the two, someone who was connected to the bar, if they could ask the bar for an extension cord." Between Jennifer and Rick, Hillinger thought it was "more likely Rick" who would have helped. The bartender then "went into, like, a back room, came out and brought [an extension cord] out. And I believe he helped set it up, but I don't know if he did or not." When asked by CC's counsel, "Did you actually see the bartender have a cord in hand?" Hillinger responded, "Yes." When asked what the bartender did with the cord, Hillinger responded, "He laid it out." "I saw the bartender put the cord down on the floor." Hillinger added, "He laid it out in a way that would be best out of the way while he was setting it up. Like the perimeters. I remember he wanted to make sure that things were out of the way." The cord "was in a bunch by the chair by the projector. And from there . . . it looked deliberately moved to be, like behind couches and . . . not laying

[2]Hillinger was unavailable at trial and his deposition transcript was read to the jury. Hillinger testified he arrived at CC at 8:00 or 8:30 p.m. Counsel for the Giordanos argued during closing that Hillinger must have been mistaken about the time because his testimony regarding the events, e.g., that the bar was "kind of empty" and that the projector was not yet set up, shows he likely arrived at CC earlier in the evening.

underneath the rug, laying on top of the rug." It occurred to Hillinger that someone could trip on the cord, but he did not say anything. When asked where the "back room" was from which Evjenth came out holding the cord, Hillinger testified, "It's the same room, I believe, they were holding on to the cake for later. It was, like, a storage kind of extra napkins, extra silverware kind of room."

Counsel for CC asked Hillinger, "Do you recall ever telling anybody prior to today that you did not know who ran the extension cord, the orange extension cord you had described?" Hillinger responded, "the extension cord I always knew was the bar's, and I always knew—I distinctly remember seeing him come out with the cord to help set it up." Hillinger was unclear as to the date he spoke to an investigator, stating, "I don't know. It has been a year. I don't know. I have no idea. I don't—this case is so not on my radar."

Rick testified he did not see Evjenth or anyone else set up an extension cord but that he did observe Evjenth help with set up by responding to a question about placement of a sheet that was going to be used as a screen.

Defense investigator Daniel Kalashian testified that when he called Hillinger to interview him about the incident, Hillinger told him that the extension cord came from the back, or that "Jennifer"[3] brought it with her. Hillinger said he believed someone at the bar had plugged in the cord and had helped with set up. At another point in the interview, Hilinger said he was not sure who set up the cords. When Kalashain called Hillinger again the next day and asked him if anyone had helped set up the cord, Hillinger responded that he did not know. When Kalashian asked Hillinger about the location of the cord, Hillinger responded that the cord was bundled atop the carpeting, and that he thought Jennifer had tripped on it.

Hendrickson testified that they had extension cords "in the office a lot," and that there was also an extension cord in a drawer. Evjenth testified that an orange extension cord was kept inside an unlocked drawer in a television cabinet in the bar. He testified there were no extension cords in the "back room." He also testified that the "office in the

[3]Kalashian did not ask Hillinger whether he was referring to Jennifer Justice or to Jennifer Giordano when he said that "Jennifer" may have brought the extension cord.

back" was "not his domain" and that he did not have a key to that room. Evjenth testified that no one asked him for an extension cord on the night of the incident, and that he had no recollection of going to the back and getting a cord for anyone. He saw someone bring in audio-visual equipment and was aware it was being set up, but he had nothing to do with the set up. He was also aware that there was only one place an extension cord could go—under the couch. He did not remember seeing a cord on the floor. The only thing he did with respect to the projector was to dim the lights for the show, and to turn the lights back up when the show ended. He testified that during most of the evening, he was behind the bar servicing clients;[4] he did go "to the back" at some point to restock ice, "do anything that I need to do, run around, get dishes . . . ." Regarding tripping hazards generally, Evjenth testified that one of his responsibilities was to look out for tripping hazards. For example, a backpack on the floor would be something he would need to look out for and remove because someone could trip over it.

Kenneth Nemire, Ph.D., a certified professional ergonomist, testified that he went to CC after the incident to take pictures and measurements but was not allowed to do so. He testified that the extension cord presented a tripping hazard for various reasons, including the fact that it was sticking up from the floor, bars are dimly lit, there was no warning, and the cord was difficult to see against the background of a multi-colored rug that covered the floor. He testified that when people walk, their eyes tend to be directed straight out 90 percent of the time, and that the lower the object is on the ground, the more difficult it is to see. He opined that the trip hazard could have been "[v]ery easily" eliminated by taping the cord down with duct tape. He did not believe it was important whether there were one or multiple cords, or whether the cord or cords was/were black or orange.

Closing arguments concluded on the afternoon of October 5, 2011, and the jury began deliberations. At approximately 11 a.m. on October 5, 2011, the jury submitted the following question to the trial court: "Substantial – question #2 – please clarify what

[4]According to Jennifer, the area in which the projector and extension cord were placed would have been visible from behind the bar.

substantial mean[s]. Does this mean the most important factor in causing harm to Jen Giordano?" After discussion with the attorneys, the court responded: "The court refers you to CACI Instruction 430. The answer to your specific question is 'no.' "[5]

The jury returned its verdict at approximately 4 p.m. on October 5, 2011. In response to the first question—"Was CC's Pierce Street Manor, LLC negligent in the use or maintenance of the property?"—ten of the jurors voted yes, and two voted no. In response to second question—"Was CC's Pierce Street Manor, LLC's negligence a substantial factor in causing harm to Jennifer Giordano?"—one juror voted yes, and 11 voted no.

The jury did not reach the remaining questions due to its response to question 2. Questions 3 to 5 sought information regarding damages. Questions 6 and 7 asked whether Jennifer was also negligent, and whether her negligence was a substantial factor in causing her harm. Question 8 asked, "Did the unnamed partygoer(s) set up the cord that Jennifer Giordano tripped or stumbled on?" Questions 9 and 10 asked whether the "unnamed partygoer(s)" was/were negligent in setting up the cord, and whether that negligence was a substantial factor in causing Jennifer's harm. Question 11 asked, "What percentage of responsibility for Jennifer Giordano's harm do you assign to the following? Insert a percentage for only those who received 'yes' answers in questions 2, 7, or 10."

On October 20, 2011, the Giordanos moved for a new trial on several grounds. They argued the jury verdict was inconsistent, or that based on the evidence presented at trial, the jury's finding that CC was negligent should have compelled it to find that CC's negligence was a substantial factor in causing harm. They also argued a new trial was warranted because jury misconduct had occurred. In support of that claim, the Giordanos submitted the declaration of a juror, Richard B., who stated that four jurors announced at

[5]CACI 430, as given, provided: "Causation: Substantial Factor [¶] A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

the outset—and before deliberations—that they would not render a finding for the Giordanos, and "maintained these statements even though all jurors readily expressed agreement that the cord on which Jennifer Giordano tripped was a tripping hazard." A " 'straw poll' " on the issue of negligence was 8 in favor of finding negligence and 4 against finding negligence, and "some votes went back and forth" as deliberations continued. At one point, the discussion turned to whether CC's negligence was a substantial factor in causing harm to Jennifer. One juror asked what "substantial" meant, and three jurors stated they did not "think it could be a substantial factor if the bar were less than 50% at fault."

After receiving the trial court's response to its question regarding the definition of substantial factor, the jury continued to deliberate, until juror Christopher B. "said he would agree to change his vote on Question 1 from 'No' to 'Yes' if the rest of the jury would vote 'No' on Question 2. [Juror] Brian [R.] said, 'OK, I'll agree to that,' or words to that effect," and the other jurors agreed to do the same. Richard B. objected and urged everyone to follow the jury instructions, but apparently did not convince the others, as he became the lone juror who voted "Yes" on Question 2.

CC opposed the motion for new trial on several grounds, e.g., that Richard B.'s declaration was inadmissible, there was no jury misconduct, and the verdict was not inconsistent—and the evidence not insufficient—because the jury could have reasonably found that CC's negligence was not a substantial factor in causing the harm.

After a hearing on the motion for new trial and the motion to strike Richard B.'s declaration, the trial court issued a written order, stating: "Despite grave reservations concerning the admissibility of the entirety of the Declaration of juror Richard B., in an abundance of caution, the court has done so and therefore denies [CC's] motion to strike it; [¶] . . . Plaintiffs' Motion for a New Trial is denied."

DISCUSSION

The Giordanos contend the trial court abused its discretion in denying their motion for new trial because under the evidence presented in this case, the jury's finding that CC was negligent compelled a finding of causation. We agree.

" 'The powers of a trial court in ruling on a motion for new trial are plenary. The California Supreme Court has held that the trial court, in ruling on a motion for new trial, has the power "to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact" [citation], that the court sits as "an independent trier of fact" [citation] and that it must "independently assess[] the evidence supporting the verdict" [citation]. The trial judge has "to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." ' " (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 588, quoting *Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503.)

" '[A] motion for new trial predicated on the ground[] of the insufficiency of the evidence . . . is addressed to the sound discretion of the trial judge; his action in refusing a new trial will not be disturbed on appeal unless it is affirmatively shown that he abused his discretion.' [Citation.] 'The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*David v. Hernandez*, *supra*, 226 Cal.App.4th at pp. 588–589.)

David v. Hernandez, *supra*, 226 Cal.App.4th at pages 582, 585, involved a vehicular accident in which plaintiff David's car collided with defendant Hernandez's truck as the truck, which had been parked facing north on the southbound shoulder of a two-lane roadway, tried to get back onto the northbound lane. The jury found by way of a special verdict that Hernandez was negligent but that his conduct was not a substantial factor in causing harm to David and his passenger. (*Ibid*.) The record was silent with regard to the jury's belief as to how Hernandez was negligent. (*Id*. at pp. 585–586.) In ruling on David's motion for new trial, the trial court found that Hernandez had parked his truck on the opposite side of the roadway, i.e., facing northbound on a southbound lane, in violation of Vehicle Code section 22502 and that the truck would not have been

in David's path " ' " 'but for its having entered from the right, a position in which it had no legal right to be.' " ' " (*Id.* at p. 589.) The trial court also found, however, that there was sufficient evidence to support the finding that Hernandez's negligent act was not a substantial factor in causing the harm because David's failure to pay attention to the road—due to being distracted as he and his passenger attempted to play music on his laptop computer—was what caused the accident. (*Ibid.*)

The Court of Appeal reversed, stating the trial court "could not have reasonably concluded 'that there was sufficient evidence . . . that lack of attention on the part of the plaintiff driver [David] was in fact the cause of the accident.' " (*Id.* at p. 591.) "David's inattentiveness could not have been the sole cause because the accident would not have occurred but for Hernandez's negligence . . . ." (*Ibid.*) The Court of Appeal stated, "If the actor's wrongful conduct operated concurrently with other contemporaneous forces to produce the harm, it is a substantial factor, and thus a legal cause, if the injury, or its full extent, would not have occurred but for that conduct." (*Ibid.*, citing *In re Ethan C.* (2012) 54 Cal.4th 610, 640.) "Pursuant to the trial court's findings, the tail end of Hernandez's truck would not have been in the southbound lane at the time of the collision, and the collision therefore would not have occurred, if Hernandez had not parked in violation of section 22502." (*David v. Hernandez*, *supra*, 226 Cal.App.4th at p. 591.) "Contrary to the trial court's ruling, its findings legally compelled it to conclude that Hernandez's negligent conduct was a substantial factor in causing the collision. The court was required to grant a new trial to afford the jury an opportunity to apply comparative fault principles." (*Ibid.*) The Court of Appeal concluded: "Here, the trial court's discretionary order denying [David's] motion for a new trial was based on an incorrect legal assumption that, despite its findings, the evidence was sufficient to show that Hernandez's negligence . . . was not a substantial factor in causing the collision. This legal error establishes an abuse of discretion." (*Id.* at p. 592.)

Similarly, here, the jury found negligence. Although the jury did not specify the way in which it believed CC was negligent, the only substantial evidence of CC's negligence involved its act of either providing and/or laying down the extension cord, or

failing to discover it and remove or tape it down to the floor. The jury could have reasonably found, based on Hillinger's testimony, that CC created the tripping hazard by providing and/or laying down the extension cord. Alternatively, the jury could have found, based on Evjenth's testimony, that CC did not provide or lay down the cord, but that it was nevertheless negligent in failing to discover the cord and remove or tape it down to the floor. There was no substantial evidence presented of any other act on the part of CC that could have led a reasonable jury to find negligence on any other basis.[6]

Next, the jury evaluated whether CC's negligence in creating or failing to correct the tripping hazard was a "substantial factor" that caused Jennifer's harm. As the trial court correctly instructed, then reiterated after the jury asked for clarification, "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm." (CACI No. 430.) The factor must be more than a "remote or trivial factor," (CACI No. 430), but even "a very minor force that does cause harm is a substantial factor" (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79).

Here, it was virtually undisputed that Jennifer's injuries resulted from her tripping over an extension cord. Ireland saw Jennifer trip over the cord which, having been coiled up at one point, did not lay flat on the floor, and over which she believed anyone would have tripped. According to Hillinger, the cord was bundled atop the carpeting, and he thought Jennifer tripped on it. Jennifer testified she was looking straight ahead in the direction she was walking when she tripped on an extension cord and fell hard. The cord was draped around Jennifer's right leg immediately after the fall, and Rick and Hillinger had to remove it before carrying her to a barstool. In contrast, there was no evidence of Jennifer tripping over a backpack, a chair, or any slippery substances. There was no evidence of anyone accidentally or intentionally pushing or shoving her down.

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[6]There was minimal testimony about how dark the bar was in comparison to other bars. In particular, Jennifer testified that when she worked at CC in 2006 and 2007, she mentioned to Hendrickson that she thought CC was more dimly lit than other bars. She also testified, however, that on the night she was injured, she did not recall thinking it was too dark.

CC argues "there was ample trial evidence to support a finding that CC's negligence . . . was not a substantial cause of Jennifer Giordano's harm." CC states that Jennifer was "distracted" because her friend was approaching, and because she "was carrying a meatball across the room to her friend." CC asserts that if Evjenth knew or should have known about the extension cord, Jennifer, who was "hosting" the party, "had superior notice and ability to do something about the cord than did the lone bartender working that night." CC also notes that other party attendees—not Evjenth—had "brought, set up, and used the projector." According to CC, "[t]his and other substantial evidence could have influenced the jury to find that, notwithstanding any negligence by CC, . . . such negligence was not a substantial factor in Jennifer Giordano's harm."

CC's argument is akin to the error the trial court made in *David v. Hernandez, supra*, 226 Cal.App.4th 578. In the same way David's inattentiveness could not have been the "sole cause" of the collision, Jennifer's carelessness—or even the carelessness of any unnamed party attendee who may have set up the projector[7]—could not have been the sole cause of the trip and fall, because the trip and fall would not have occurred but for CC's negligent act of creating or failing to correct the tripping hazard. (*Id.* at p. 591.) "[T]he substantial factor standard, formulated to aid plaintiffs as a broader rule of

[7]As to the Giordanos's contention that the trial court erred in instructing the jury regarding apportionment of fault to any unnamed party attendees, we conclude that an instruction and corresponding verdict form allowing a jury to apportion fault to such individuals would be appropriate if there is evidence establishing a claim of negligence against those individuals. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [a defendant's liability for noneconomic damages cannot exceed its "proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit," italics omitted].) *Sirthong v. Total Investment Company* (1994) 23 Cal.App.4th 721, on which the Giordanos rely, is inapposite because here, the unnamed party attendees were not agents, independent contractors, or employees of CC. (*Id.* at pp. 724–726 [defendant property owner who hired a roofing company that caused injuries to the plaintiff could not delegate its mandatory duty to maintain safe premises to the roofing company, and apportionment was therefore inappropriate].) Because we reverse the judgment on other grounds, we need not, and will not, decide whether the evidence in this case was sufficient to support the presentation of the instruction and corresponding verdict form to the jury.

causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of the plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. [Citation.] Misused this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968–969.) In other words, in this case, any percentage of negligence attributable to Jennifer or to the unnamed party attendee went to the issue of *comparative negligence*, not to the issue of whether CC's negligent act was a substantial factor in causing harm. (See *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121–122 [the trial court in granting a new trial motion noted that the plaintiff's negligence in failing to take care of himself went to the issue of comparative negligence, not to the issue of whether his optometrist's negligence in failing to detect glaucoma was a substantial factor in causing the harm].)

Moreover, "[w]here, as here, there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict. As long as a single theory of negligence is lawfully rebutted on a lack of causation theory, it matters not that another theory of negligence is not so rebutted." (*Jonkey v. Carignan Const. Co.* (2006) 139 Cal.App.4th 20, 26.) Here, there was only *one* theory under which a reasonable jury could have found negligence—the tripping hazard created by the extension cord. CC has failed to cite—and we have not found—any other negligence theory that can be rebutted due to lack of causation. Accordingly, in finding that CC was negligent, the jury had to have found that CC either created or failed to correct the very tripping hazard that caused the accident and harm. Under the circumstances of this case, the jury's negligence finding compelled a causation finding. The trial court should have granted the Giordanos's motion for new trial.[8]

[8]In light of our conclusion that the jury's negligence finding in this case compelled a causation finding, we need not address the Giordanos's remaining contentions. However, we note as to the issue regarding admissibility of investigator Kalashian's testimony, that the trial court should have given a limiting instruction to make clear to the

DISPOSITION

The judgment is reversed. The order denying the motion for a new trial is vacated and the trial court is directed to enter a new order granting the motion for a new trial. Appellants Jennifer and Riccardo Giordano shall recover their costs on appeal.

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Jenkins, J.

We concur:

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Pollak, Acting P.J.

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Siggins, J.

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jury that his testimony regarding Hillinger's statements to him were admissible for impeachment purposes only, not for the statements' truth. (Evid. Code, § 1202.) In light of our reversal of the judgment on other grounds, we need not, and will not, address whether the court's error in this regard was prejudicial to the Giordanos.